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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

WAYNE VINCIGUERRA,

Plaintiff and Respondent,

v.

CITY OF SAN LUIS OBISPO,

Defendant and Appellant;

D'ARCY AND HARTY
CONSTRUCTION, INC.,

Real Party in Interest and Respondent.

2d Civil No. B235067
(Super. Ct. No. CV100705)
(San Luis Obispo County)

The requirements for bids submitted for public works projects ordinarily are governed by the Public Contract Code. Charter cities, however, have latitude in the practices and procedures they employ in soliciting and awarding contracts for public works projects.

This appeal involves the issue of whether a charter city has authority to require contractors bidding on public works projects to demonstrate that they have prior experience constructing similar public works projects in order to be considered responsive to a request for bids.

Appellant City of San Luis Obispo (City) is a charter city. In its solicitations for bids for a large sewer line replacement project it required that bidders provide the City with information concerning prior experience with similar projects, specifically, experience with the "pipe bursting" method of sewer line replacement.

Respondent Wayne Vinciguerra submitted the lowest monetary bid. His bid listed five recent public works contracts but his submittal was insufficiently detailed to demonstrate that he had the requisite background and experience. The City determined the bid not "responsive" and asked that he provide the requested detail. He declined to do so. The City awarded the contract to the second lowest monetary bidder, real party in interest D'Arcy and Harty Construction, Inc. At a public meeting, the City Council denied Vinciguerra's appeal after receiving a staff report and presentations by the interested parties.

Vinciguerra filed a petition for writ of mandamus (Code Civ. Proc., § 1085) in which he contended the criteria used to determine whether his bid was responsive was not permitted by the Public Contract Code and he was entitled to a hearing before the City Council prior to award of the contract. After a bench trial, the court found that the City violated statutory procedures governing competitive bidding on public works projects by including criteria in the bid specification not authorized by statute or the City's charter. We conclude the trial court erred in failing to recognize the latitude a charter city has in fashioning its bidding protocol and reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant City invited bids for "Sewerline Replacements 2010-2011, Project 2, Specification No. 90938" (the project). Section 8 of the notice to bidders, entitled "Contractor Qualifications," states: "The Contractor shall have Public Works experience constructing projects similar to the work specified for this project and must provide satisfactory evidence showing a minimum of five years experience in installing pipe using the pipe bursting method.

"The Contractor shall provide qualifications and references for five similar Public Works projects completed as either the prime or subcontractor. At least one of the

five reference projects must have been completed under contract with a public agency. All reference projects shall be completed within the last five years from this project's bid opening date.

"The Contractor's references will carry substantial weight in determining responsiveness of bid. Contractor shall provide references with the Bid Proposal at [the] time of bid opening. Forms are provided as part of the Bid Proposal section for Contractor's use. The City will make the final determination as to the acceptability of Contractor's qualifications and reserves the right to reject any bid based solely on submitted references whenever it determines such rejection is in the City's best interest."

Bids were opened on September 15, 2010. Vinciguerra submitted the low bid at \$408,720. D'Arcy's bid was \$454, 246.

On September 22, 2010, City staff notified Vinciguerra that his bid was considered nonresponsive because the references provided did not show that he had experience with sewer pipe replacement or the pipe bursting method. The City requested that Vinciguerra submit revised references meeting bid specifications. He declined to do so. The contract was awarded to D'Arcy on October 19, 2010. Vinciguerra appealed to the City Council. At the November 9, 2010, City Council meeting, City staff presented its report and the Vinciguerra brothers, their attorney, a representative of D'Arcy, and its attorney also made statements. A representative of the company manufacturing pipe bursting equipment also spoke. Vinciguerra was not given an opportunity to respond to statements made by either D'Arcy or City staff.

The staff's presentation explained why sewer line replacement using the pipe bursting method was important in determining bid responsiveness: "This project will replace sewerlines on Peach, Santa Rosa and Walnut Streets. . . . [¶] . . . Pneumatic pipe bursting was selected as the method for replacement because . . . [¶] [it] uses a higher quality seamless pipe than conventional trenching. The higher quality pipe costs are offset by a reduced installation cost. [¶] We believe the pipe to be a longer-lasting pipe material and less time to construct it. . . . [¶] [T]he installation method for pneumatic pipe bursting

. . . basically destroys the existing pipe and pulls through the newer HDPE pipe at the same time. . . . [¶] Pneumatic pipe bursting, if not successfully completed . . . destroys the existing pipe. It renders the sanitary sewer system unusable, and there's increased public inconvenience because of the immediate emergency repair that will need to take place and then the eventual permanent repair, whatever that might be."

The City Council denied the appeal, finding that requiring prebid qualification was appropriate. It also found that strict conformance with those qualifications was important because the project was a mainline sewer in a downtown location that will affect many citizens. Vinciguerra was afforded an opportunity to demonstrate he had the appropriate experience, but chose not to do so. The Mayor stated: "This is much more complicated than a normal sewerline replacement. At least the implications are quite critical if the contractor gets into trouble, because this is an active sewerline, it's also near a creek, it's out in traffic, it could have serious implications . . . the apparent low bidder is actually not responsive to the specifications that were spelled out here and the specifications were clear and reasonable"

Vinciguerra filed a petition for writ of mandate and declaratory relief. He also filed an ex parte application to enjoin the project and shorten time for hearing on the writ petition. The application was denied, and D'Arcy continued to work on the project. After a bench trial, the court determined that the City had not followed proper procedures, concluding that "the competitive bidding process utilized by the City in awarding the contract to D'Arcy is defective and contrary to law." The court reasoned that the contractor qualifications in the bid specifications could not be used in determining whether a bid was responsive. The contractor qualifications could only be used to determine whether Vinciguerra was the "lowest responsible bidder." As D'Arcy had completed the project during the pendency of the petition, the court determined mandamus was not an effective remedy and issued a declaratory judgment in favor of Vinciguerra.

Vinciguerra moved for attorney fees pursuant to Code of Civil Procedure section 1021.5 in the amount of \$43,905. The City and D'Arcy opposed the request. The court found Vinciguerra was entitled to fees, but reduced the amount to \$24,780.

On appeal, the City contends the trial court erred because a charter city has discretion to require bidders to comply with criteria in addition to or different than that imposed by state law and the procedures it followed in awarding the contract complied with its charter and ordinances. It also asserts that Vinciguerra is not entitled to attorney fees because he has not met the criteria for an award under Code of Civil Procedure section 1021.5.¹

We conclude that a charter city has authority to develop performance standards for public works projects and that such standards may be considered in determining a contractor's responsiveness to an invitation for bids.

DISCUSSION

Standard of Review

"Appellate review of the award of a public contract is governed by certain well-established principles. In a mandamus action arising under Code of Civil Procedure section 1085, we limit our review to an examination of the proceedings before the agency to determine whether its findings and actions are supported by substantial evidence. [Citations.] 'Our review is limited to an examination of the proceedings to determine whether the City's actions were arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure. There is a presumption that the City's actions were supported by substantial evidence and [petitioner/plaintiff] has the burden of proving otherwise. We may not reweigh the evidence and must view it in the light most favorable to the City's actions, indulging all reasonable inferences in support of those actions. . .'" (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 368.) "We exercise independent judgment, however, in determining whether [City

¹ We granted the application of the League of California Cities to file an amicus curiae brief on behalf of the City.

regulations are] consistent with applicable law, such as the competitive bidding statutes." (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.)

Competitive Bidding Statutes

General law cities must strictly comply with the competitive bidding procedures contained in the Public Contract Code. Public Contract Code section 20162² provides: "When the expenditure required for a public project exceeds . . . (\$5,000), it shall be contracted for and let to the lowest responsible bidder" Section 1103 defines the term "responsible bidder" as one "who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract."

In contrast, charter cities are not so limited. Section 1100.7 states: "With regard to charter cities, this code applies in the absence of an express exemption or a city charter provision or ordinance that conflicts with the relevant provision of this code."

The Power of Charter Cities

In *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-171 (*Domar*), our Supreme Court gave an overview of the scope of a charter city's powers: "We begin with the cardinal principle that the charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. [Citation.] In this regard, '[t]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. [Citations.]" [Citations.] The expenditure of city funds on a city's public works project is a municipal affair. [Citations.]

"[B]y accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter." [Citations.] Charter provisions are

² All further statutory references are to the Public Contract Code unless otherwise indicated.

construed in favor of the exercise of the power over municipal affairs and 'against the existence of any limitation or restriction thereon which is not expressly stated in the charter' [Citations.] Thus, '[r]estrictions on a charter city's power may not be implied.' [Citation.]"

City Charter and Municipal Code

Vinciguerra argues that only the amount of the bid may be considered in ascertaining whether a bid is "responsive." Any additional criteria, such as that contained in the City's bidding specifications, are criteria that determine whether a bidder is "responsible" and may only be considered subsequently at a due process hearing. We disagree.

Section 901(A) of the San Luis Obispo City Charter states: "[E]very project involving an expenditure of City monies of more than the amount specified in Section 20162 of the Public Contract Code . . . for the construction or improvement of . . . sewers . . . shall be let by contract to the lowest responsible bidder after notice"

San Luis Obispo Municipal Code section 3.24.210 is entitled "Determination of lowest responsible bidder" and states: "In addition to the bid or quotation price, criteria for determining the lowest responsible bid or quotation, for the purposes of the Charter and this chapter, shall include, but not be limited to, the following:

"A. The character, integrity, reputation, judgment, experience and efficiency of the bidder (this may include an analysis of previous work performed for the city);

"B. The ability of the bidder to perform the contract, or provide the supplies, equipment or services required, within the time specified, without delay or interference;

"C. The ability of the bidder to provide future maintenance, repair parts and replacement of purchased equipment or supplies;

"D. Compliance by the bidder with federal acts, executive orders and state statutes governing nondiscrimination in employment; and

"E. The results of any evaluation relating performance and price, such as testing, life-cycle costing, and analysis of service, maintenance and technical data."

The City Did Not Violate its Charter or Competitive Bidding Statutes

In *Domar*, our Supreme Court addressed the power of a charter city to consider criteria other than the amount of the bid in determining whether a bid is responsive. The City of Los Angeles included in its bid specifications for a public works project the requirement that the bidders submit documentation of their compliance with a subcontractor outreach program meant to promote inclusion of minority and women-owned businesses in the construction business. This requirement was not contained in the City's charter or other municipal regulations.

The lowest monetary bidder was rejected as nonresponsive because its bid failed to include the information required by the City regarding the outreach program, and the contract was awarded to the second lowest monetary bidder. The low bidder filed a petition for writ of mandate seeking to prevent the City from awarding the contract to any contractor other than itself. The trial court denied the petition, and the Court of Appeal reversed on the ground that the authorization for the outreach program was not expressly set forth in the City's charter and, therefore, the City's rejection of the low bid based on failure to submit outreach documentation violated a provision in the City's charter requiring contracts to be awarded to the "lowest and best regular responsible bidder." (*Domar*, *supra*, 9 Cal.4th at pp. 168-169.) The Supreme Court reversed the Court of Appeal, holding that a charter city has authority to include bid specifications not expressly contained in the City's charter.

The court construed two provisions of the city's charter. The first authorized the city to impose certain requirements upon bidders as part of the competitive bidding process, expressly stating that "[b]idders may be required to submit with their proposals detailed specifications of any item to be furnished, together with guarantees as to efficiency, performance, characteristics, operating cost, useful life, time of delivery, and other appropriate factors." The second provision required that bids shall be awarded to the

"lowest and best regular responsible bidder." (*Domar, supra*, 9 Cal.4th at p. 172, fn. omitted.)

The court held that the outreach program requirement did not violate the charter and did not violate the purposes of competitive bidding, which are "'to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public' [citations]" (*Domar, supra*, 9 Cal.4th at pp. 172-173.) The court held the outreach program advanced competitive bidding goals by stimulating advantageous marketplace competition. The court also held that the city could reasonably have determined that the program would assist the city in securing the best work at the lowest price practicable and was fully compatible with the charter requirement that contracts be awarded to the lowest and best responsible bidders. (*Id.* at pp. 173-174.) The court concluded: "[s]ince the City and its agencies may validly require bidders to conduct the specified outreach without violating the charter, it follows that the Board may validly reject a bid based on the bidder's failure to demonstrate compliance with this requirement. . . . [T]he Board's action in rejecting [the low] bid due to the absence of the required good faith effort documentation is consistent with the general rule that bidding requirements must be strictly adhered to in order to avoid the potential for abuse in the competitive bidding process." (*Id.* at pp. 175-176, fn. omitted.)

The *Domar* court distinguished *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, relied on by Vinciguerra, as follows:

"Although our decision in *City of Inglewood, supra*, 7 Cal.3d 861, makes clear that a competitive bidding scheme with a lowest responsible bidder restriction ordinarily requires a contract to be awarded to the bidder who submits the lowest monetary bid and is responsible, the case does not concern the issue presented here, i.e., whether a public entity may, consistently with its charter, impose certain requirements upon bidders as part of the bid specifications for a project. Unlike the instant case, *City of Inglewood, supra*, did not involve a challenge to the validity of a particular bid requirement, nor did it concern a

situation where the lowest monetary bidder had failed to comply with all advertised bid requirements." (*Domar, supra*, 9 Cal.4th at p. 178, fn. omitted.)

Domar was followed in *MCM Construction, Inc. v. City and County of San Francisco, supra*, 66 Cal.App.4th 359. In that case, a city rejected as nonresponsive a low bid for a public works project because the bidder failed to list the dollar amount of work to be performed by subcontractors, a requirement imposed by the city's invitation to bid and the city administrative code. The trial court denied the petition and the Court of Appeal affirmed. On appeal, the low bidder asserted that the city could not legally require it to list the prices paid to subcontractors as the city's administrative code imposed requirements above and beyond the mandates of state law and therefore could not be used to determine the responsiveness of MCM's bid. The Court of Appeal rejected the argument holding that a charter city could impose more restrictive requirements to determine bid responsiveness. (*MCM, supra*, at pp. 371-372.)

In *M&B Construction v. Yuba County Water Agency* (1999) 68 Cal.App.4th 1353, the lowest monetary bidder was not selected because it did not meet bid specification criteria requiring that bidders have a class "A" license. The low bidder filed a petition for writ of mandate directing the public agency to allow all legally licensed contractors to bid on a project. The trial court granted the petition and the Court of Appeal reversed. Relying on *City of Inglewood*, the low bidder asserted that requiring a class "A" license permitted the agency to consider the "relative superiority" of the bidders. The *M&B* court rejected the argument. "Here, unlike in *City of Inglewood*, the Agency did not make a postbid determination that one of the responsible bidders was relatively superior to the admittedly responsible low bidder. Nor did it devise bid specifications favoring a particular contractor. Based on the recommendations of its engineer, the Agency made a prebid determination that the public would be better served in terms of quality and economy by letting the project only to licensees with the most appropriate experience, while minimizing the need for subcontractors. Such an administrative decision is subject to reversal only if it is "arbitrary,

capricious or entirely lacking in evidentiary support, . . . contrary to established public policy or unlawful or procedurally unfair"" (*M&B, supra*, at p. 1361.)

These cases and section 1100.7 are dispositive of the issue raised in this case. A charter city has discretion to impose bid specification criteria different than or in addition to that prescribed by state law or its own charter and to use that criteria to determine whether a bid is "responsive." In this case, section 3.24.210 of the municipal code authorizes the City to include in bid specifications criteria in addition to the amount of the monetary bid, specifically, criteria demonstrating "[t]he character, integrity, reputation, judgment, experience and efficiency of the bidder (. . . includ[ing] . . . previous work performed for the city)" and "[t]he ability of the bidder to perform the contract, or provide the supplies, equipment or services required, within the time specified, without delay or interference." The requirement that bidders demonstrate that they have substantial pipe bursting experience and experience in public works construction is precisely the type of information authorized by section 3.24.210. As *Domar* makes clear, the fact that neither the charter nor City code expressly authorizes such criteria does not establish a violation of either the City's charter or competitive bidding statutes.³ The record contains substantial evidence that the additional criteria adopted by the City furthers the goals of preventing waste of public funds and obtaining the best economic result for the City. (*Domar, supra*, 9 Cal.4th at pp. 172-173.)

As the City did not err in requiring bidders to provide evidence of substantial pipe bursting experience in response to the invitation for bids, the City was not required to provide a hearing before the decisionmaker. The procedure utilized and approved in *Domar*--informing the low bidder that his bid did not comply with bid specifications and giving him an opportunity to provide further information before the contract was awarded--was followed here.

³ Vinciguerra relies heavily on *D.H. Williams Construction, Inc. v. Clovis Unified School Dist.* (2007) 146 Cal.App.4th 757, and *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, both of which discuss the dichotomy between bid responsiveness and bidder responsibility. These cases are inapposite as neither involves a charter city.

As Vinciguerra is no longer the prevailing party, the award of attorney fees under Code of Civil Procedure section 1021.5 is reversed. (See, e.g., *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 363 [fee award reversed because plaintiff was not a successful party within meaning of Code Civ. Proc., § 1021.5].)

CONCLUSION

As a charter city, the City had authority to request that a contractor provide details of his expertise and experience in his bid response to screen applicants who lacked minimum qualifications to complete the project.

The judgment is reversed. Appellant shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Charles S. Crandall, Judge
Superior Court County of San Luis Obispo

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No appearance for Real Party in Interest and Respondent.